Office - Supreme Court, U. S.
FILED
NOV 8 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,

Petitioners,

v.

NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; CARL B. BRANDENBURG, County Treasurer of Macomb County; GUY L. BROWN, County Clerk of Macomb County; BERT ENGELBRECHT, Drain Commissioner of Macomb County; SHERWOOD BENNETT, Comptroller of Macomb County; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, a municipal corporation; TOWNSHIP OF WARREN, a municipal corporation; TOWNSHIP OF ERIN, a municipal corporation; CITY OF EAST DETROIT, a municipal corporation; VILLAGE OF CENTERLINE, a municipal corporation; ALFRED POERSTER, CHRIST F. KAISER and HENRY JACOBS, Taxpayers, and ALEXANDER L. WALTENSPERGER and NELLIE WALTENSPERGER, Taxpayers,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,
BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,

Petitioners,

v.

NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; CARL B. BRANDENBURG, County Treasurer of Macomb County; GUY L. BROWN, County Clerk of Macomb County; BERT ENGELBRECHT, Drain Commissioner of Macomb County; SHERWOOD BENNETT, Comptroller of Macomb County; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, a municipal corporation; TOWNSHIP OF WARREN, a municipal corporation; TOWNSHIP OF ERIN, a municipal corporation; CITY OF EAST DETROIT, a municipal corporation; VILLAGE OF CENTERLINE, a municipal corporation; ALFRED FOERSTER, CHRIST F. KAISER and HENRY JACOBS, Taxpayers, and ALEXANDER L. WALTENSPERGER and NELLIE WALTENSPERGER, Taxpayers,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

We respectfully submit that Relators' Petition for Rehearing after denial of Petition for Writ of Certiorari should not be granted, for the following reasons:*

1. In this case the Petition for Certiorari was denied and, in accordance with Rule 34, no mandate was issued,

---

*This case is one of five related cases, this Court Docket Nos. 287 to 291, and the reasons stated in this Brief in opposition to the Petition for Rehearing apply equally to all of said cases.

but the Clerk forthwith entered an order to the effect that the Petition for Certiorari was denied and notified the court below and counsel of record. The court below being the Circuit Court of Appeals, Sixth Circuit, in accordance with the Rules of the Sixth Circuit Court of Appeals, issued and filed with the District Court of the United States, Eastern District of Michigan, Southern Division, the following mandate:

> "It is now Ordered, Adjudged and Decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed and the bill of complaint is dismissed."

The said mandate was filed in the District Court on October 22, 1941. The Bill of Complaint in this case and all companion cases stands dismissed and injunctions which were predicated upon the bills of complaint were dissolved upon the dismissal of the respective complaints.

2. The identical argument now made by petitioners in this Petition with reference to the case of *Highland Park et al. v. Clark et al.*, was made by counsel in their Petition for Certiorari—pages 14 and 43, was fully answered in Respondents' Brief in opposition to the petition for certiorari—pages 59 to 63, and was again raised in Petitioner's Reply Brief—pages 4 to 7, and in Petitioners' Motion to Enlarge Time for Filing Petition for Rehearing, pages 1 to 3. All the points now advanced in support of this Petition were strenuously argued by counsel for petitioners in their briefs in support of the Petition for Certiorari, and this Court was fully apprised of all the facts connected with the said case of *Highland Park v. Clark.* In the case of *Giant Powder Co. v. Cal. Vigorit Powder Co.*, 5 Fed. 197, 201, the Court stated:

> "A new hearing should not be had simply to allow a re-hash of old arguments."

To bring before this Court the true facts in connection with the case of *City of Highland Park v. Clark,* we wish to give this Court a brief history of the circumstances which led to the filing of the said mandamus action. On May 17, 1935, the Michigan Supreme Court decided the case of *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, and held the same drain proceedings now involved in the City of Highland Park case to be illegal and enjoined the collection of taxes to pay for the project. Shortly after the said Michigan decision the bondholders committee which had been organized in 1932 for the purpose of creating diversity of citizenship to give the Federal Courts jurisdiction started the case of *Keefe, et al., Plaintiffs, v. Royal Oak Storm Sewer Drain District No. 7, et al., Defendants,*—Equity Cause No. 7564, in the United States District Court for the Eastern District of Michigan, Southern Division. The relief sought in said Federal Equity cause No. 7564 was to have the decision of the State Court in the Village of Oak Park case decreed by the Federal Court to be of no force and effect, to have the bonds decreed valid and to enforce the levying of assessments. The party plaintiffs in said case were the same bondholders' committee who are the plaintiffs in these cases. Said Equity Cause No. 7564 was at issue in the Federal District Court; all the interested parties were represented, depositions had been taken, and the case could have been tried in the Federal Court. However, after the decision of the Circuit Court of Appeals in these cases, which involve substantially identical issues, the bondholders' committee on the sworn representation to the Federal District Court that the situation between the parties to that case had been changed by the execution of a refunding agreement, obtained a dismissal of said cause No. 7564 on June 6, 1941. The following day, June 7, 1941, the *City of Highland Park v. Clark* case was filed in the Michigan Supreme Court. Said suit was filed only against the Drain Commissioner and the Board of Supervisors.

Numerous interested parties, including the Village of Oak Park which had already obtained a decree enjoining the collection of the tax, were not made parties to the suit. The representation upon which the Order of Dismissal of the Federal case was based was not true because at that time the validity of the refunding agreement had been denied and the Drain Commissioner had notified bondholders in a letter dated May 29, 1941, of the impossibility of refunding void bonds.

The above facts are called to the attention of this Court so that the purpose of relators in the *Highland Park v. Clark* case in hastily dismissing the Federal suit and bringing said mandamus proceedings before the Michigan Supreme Court may be understood. The same parties who are the petitioners in these proceedings appear by the same counsel as relators in the Michigan mandamus proceedings. Thus, the said bondholders' committee, after years of attempting to avoid the effect of the Michigan decisions with reference to the said project and after having deliberately sought the jurisdiction of the federal courts and after years of proceedings in the federal courts, are now seeking within one month after an adverse decision by the Circuit Court of Appeals in these cases to shift back to the Michigan Supreme Court. The decision of the Michigan Supreme Court in the Village of Oak Park case is a final adjudication holding that the identical proceedings involved in the Highland Park case are illegal, that the doctrine of estoppel does not apply where there is a complete lack of jurisdiction and that the collection of taxes to pay for the project would deprive the taxpayers of their property without due process of law. Petitioners should not now be permitted to delay the proceedings in this Court by what, in effect, amounts to a request to the Michigan Supreme Court for a rehearing upon the same issues which were adjudicated by the Michigan Supreme Court

in the Village of Oak Park case. We, therefore, respectfully submit that the circumstances which surround the starting of the Highland Park case in the Michigan Supreme Court are not such as would appeal to the conscience of this Court, and we submit that not only because the Michigan law followed by the Circuit Court of Appeals is clear-cut upon the issues herein, but also because by their actions in starting the Highland Park case in the Michigan Supreme Court after dismissing an identical action in the Federal Court, petitioners are not entitled to any consideration on the part of this Court in the way of delaying the decision of this Court pending the outcome of the said Highland Park case.

In view of the fact that this Court denied the Petition for the Writ of Certiorari with full knowledge of the pendency of the said *Highland Park v. Clark* case, that no new issue or fact has been raised which would entitle petitioners to a reconsideration of its Petition for Certiorari by this Court, that it is not the purpose of a rehearing to review questions which have been previously fully presented to the court, that the order of this Court has been entered, the mandate of the Circuit Court of Appeals denying the bill of complaint has been issued, filed with the District Court and acted upon, that the litigation concerning this project has been pending for in excess of ten (10) years and that there ought to be some end to litigation, we respectfully submit that this Court should deny the Petition for Rehearing.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan;
BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

Office - Supreme Court, U. S.
FILED
MAR 6 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile Halfway Drain District of Macomb County, Michigan,
Petitioners,
vs.
NINE MILE HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REHEARING

DAVID M. WOOD,
RAYMOND K. DYKEMA,
2746 Penobscot Building,
Detroit, Michigan,
Counsel for Petitioners.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

SUBJECT INDEX

	Page
Introductory statement referring to briefs filed in companion cases	1
Even if State Court's opinion remains in substantially the same form as the one on file it demonstrates the truth of petitioners' contention that the lower court erred in determining local law...	2
(a) Local court differs with lower court in regard to claims of *res judicata*.....	2
(b) Also in regard to effect of Thompson v. Mecosta, 127 Mich. 522.....	3
(c) Also in regard to inconsistency of bond recitals with claim of invalidity urged.....	4

INDEX OF AUTHORITIES

Royal Oak Drain District v. Keefe, 87 F. (2) 786....	3
Schmid v. Village of Frankfort, 131 Mich. 197.....	3
Thompson v. Village of Mecosta, 127 Mich. 522.....	3
Township of Lake v. Millar, 257 Mich. 135.....	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile Halfway Drain District of Macomb County, Michigan,
Petitioners,
vs.
NINE MILE HALFWAY DRAIN DISTRICT,
a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REHEARING

In the companion cases of *Keefe, et al., v. Martin Drain and Branches Drain District*, No. 289, and *Keefe, et al., v. Centerline Relief Drain District*, No. 290, counsel for respondents have brought to the court's attention the recent opinion of the Supreme Court of Michigan in *City of High-*

land Park v. Clark. In a reply brief in *Keefe v. Martin Drain and Branches Drain District* we have set forth reasons why this court should defer action on the pending petition for rehearing until it is known that the opinion of the Michigan Supreme Court is final and official. We refer to what was there said, and urge that the same reason for deferring action on the petition applies here.

We also wish to point out in this case,

THAT EVEN IF THE STATE COURT'S OPINION REMAINS IN SUBSTANTIALLY THE SAME FORM AS THE ONE ON FILE IT DEMONSTRATES THE TRUTH OF PETITIONERS' CONTENTION THAT THE LOWER COURT ERRED IN DETERMINING LOCAL LAW

(a) An essential and necessary step in the lower court's reasoning was that the decision and decree of the Michigan Courts relating to the Nine Mile Halfway Drain in *Township of Lake v. Millar,* 257 Mich. 135, was *res judicata* against bondholders in this case. The lower court said (R. 986):

> "The officers of the drain district represented all creditors of the district, and thus appellants (appellees) had notice and were given their day in court in those cases."

Because of this the lower court said later "Those cases are *res judicata* of the determinative facts of this controversy." This statement as to a relationship between bondholders and the officers of the drain district is flatly contradicted by the Michigan Court. It says (see page 9 of Respondents' Brief):

> "We do not say that the Village of Oak Park case *(supra)* is *res judicata* of the rights of relator bondholders, nor do we hold that they had their day in court, through representation of the drain commissioner who was the defendant in that action."

While it says that the Oak Park case which inolved the same improvement is a precedent which it should follow that reasoning cannot be applied here. We have here a vastly different presentation of facts concerning the nature of the improvement. As the Michigan Court recognized that a different presentation of facts than that which had before been shown would cause a different result, the lower court ought to have considered the facts in regard to the Nine Mile Halfway Drain in the light of all decisions of the Michigan Supreme Court involving the legality of drainage projects. The Master correctly recognized that *Township of Lake v. Millar (supra)* was of no value as a precedent because of the paucity of consideration there given to the character of the improvement (R. 154), and that he must consider the evidence before him. His opinion of illegality, and the district judge's confirmation of his report, were properly questioned below by petitioners on the ground that the evidence was insufficient to support the conclusion. It was the duty of the lower court to investigate and pass upon this. Its refusal to do so could only have resulted from a conclusion, now proven erroneous, that the matter was *res judicata* by the decree in *Township of Lake v. Millar (supra)*. Had it not been for this error, the lower court, following its own precedent in *Royal Oak Drain District v. Keefe,* 87 F. (2) 278, would undoubtedly have considered the sufficiency of the evidence, and we believe would then have held that in the light of all decisions in Michigan relating to the sewer-drain contr versy that illegality of the structure was not established.

(b) The lower court rejected the authority of *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, saying that "the village themselves took part in the false recital" (R. 986). The Michigan Supreme Court, however, accepts these cases

as authorities which would rule the decision in all cases involving drain bonds, *bona fide* held, where the bonds themselves contained no notice of infirmity. It held that the Royal Oak No. 7 Storm Sewer Drain District bonds contained this notice of infirmity because of the title of the improvement. It must necessarily follow from this that had the words "storm sewer" been omitted from this title, the decision would be the other way. It emphasized by quotation from the Thompson case, the following: "A *bona* fide purchaser for value had a right to rely upon the statement of the board, appearing on the bond, that it was issued to borrow money under this act, for lawful purposes, i. e., public improvements." (See p. 11 Respondents' Brief. in *Keefe v. Martin Drain and Branches Drain District.*) In this case the title of the proceedings and bonds, and all references therein, indicated that the improvement contemplated would be a drain (R. 22, 950). These bonds carried on their face a false pretense, in that they certified that the money was to be spent to build a drain, and that all acts, conditions, etc., existed and had been performed to make them binding obligations.

(c) Recognition of the authority of *Thompson v. Mecosta (supra),* and other Michigan cases of like import and the authorities cited therein, necessarily controverts the lower court's theory that the recitals in these bonds did not have such force as to make them inconsistent with the claim that the improvement was not to be a drain. In the Thompson case, the recital was merely compliance with the governing law. Here the bonds not only recite compliance, but add the further statement of the due happening, existence and performance of all acts and events essential to their validity.

It cannot be doubted that had the lower court known the views of the Michigan Court of last resort, as expressed

in this opinion, it would have eliminated from its opinion its determination that a decree in a prior suit was *res judicata,* that a drain districts bonds with recitals such as these do not carry a false pretense, and that such bonds would not estop the district to assert that the improvement built with their proceeds was not a drain. With these propositions eliminated, we believe it logical to infer that the lower court would have affirmed the district court's decree.

We submit that the opinion of the state court demonstrates vital errors by the lower court in its assumption that local law required it to reverse the district court in this case. Local law, in its application to drain bonds and the facts in this case, is now known, or will be as soon as this opinion of the Michigan court becomes final and official. Therefore, the petition for rehearing and petition for certiorari should be granted, and the case reversed and remanded to the lower court, with directions to decide the case in accordance with the now known principles of local law.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

MAR 27 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,
Petitioners,

v.

NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; CARL B. BRANDENBURG, County Treasurer of Macomb County; GUY L. BROWN, County Clerk of Macomb County; BERT ENGELBRECHT, Drain Commissioner of Macomb County; SHERWOOD BENNETT, Comptroller of Macomb County; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, a municipal corporation; TOWNSHIP OF WARREN, a municipal corporation; TOWNSHIP OF ERIN, a municipal corporation; CITY OF EAST DETROIT, a municipal corporation; VILLAGE OF CENTERLINE, a municipal corporation; ALFRED FOERSTER, CHRIST F. KAISER and HENRY JACOBS, Taxpayers, and ALEXANDER L. WALTENSPERGER and NELLIE WALTENSPERGER, Taxpayers,
Respondents

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,
BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,
Petitioners,

v.

NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; CARL B. BRANDENBURG, County Treasurer of Macomb County; GUY L. BROWN, County Clerk of Macomb County; BERT ENGELBRECHT, Drain Commissioner of Macomb County; SHERWOOD BENNETT, Comptroller of Macomb County; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, a municipal corporation; TOWNSHIP OF WARREN, a municipal corporation; TOWNSHIP OF ERIN, a municipal corporation; CITY OF EAST DETROIT, a municipal corporation; VILLAGE OF CENTERLINE, a municipal corporation; ALFRED FOERSTER, CHRIST F. KAISER and HENRY JACOBS, Taxpayers, and ALEXANDER L. WALTENSPERGER and NELLIE WALTENSPERGER, Taxpayers,
Respondents

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

On October 13, 1941 this Court denied a petition for certiorari seeking to review an order of the Circuit Court of Appeals (Sixth Circuit) of March 14, 1941 dismissing

---

*This case is one of five related cases, this Court Docket Nos. 287 to 291, and the reasons stated in this Brief in opposition to the Petition for Rehearing apply equally to all of said cases.

the Bill of Complaint in this and four associated cases, upon which cases rehearing was denied by the Circuit Court of Appeals on March 9, 1941. Subsequently this court denied a motion to extend the time in which to file a petition for rehearing and petitioners then filed the pending petition for rehearing.

THE PETITION FOR REHEARING SHOULD BE DENIED BECAUSE THE DECISION OF THE CIRCUIT COURT OF APPEALS HAS BEEN APPROVED BY THE MICHIGAN SUPREME COURT

It has always been respondents' contention that the only substance to the petition for rehearing was a request by petitioners for this court to withhold passing upon the petition for rehearing while petitioners' counsel attempted to have the Supreme Court of the State of Michigan change the law of the State. We pointed out in previous briefs filed in this Court how the Highland Park case was commenced in the State court subsequent to the dismissal of the Bill of Complaint in this case by the Circuit Court of Appeals. Petitioners' counsel's first request was that this court withhold passing upon the petition for rehearing until the State court decided the Highland Park case. In respondents' briefs filed in associated cases, this court docket No. 289 and 290, we advised this court that the Highland Park case had been decided by the State court, and included a copy of the court's opinion in the brief.* Peti-

*The copy of the State Court's opinion attached to previous briefs filed were received by counsel through the mail from the Clerk of the Michigan Supreme Court. We attach hereto as Exhibit A, a certified copy of the State Court's opinion to eliminate any question as to what the State Court held.

tioners' counsel then requested this court to withhold passing upon the pending petition for rehearing in these cases until their petition for rehearing in the Highland Park case was decided by the State Court. Briefs were filed by opposing counsel in the Highland Park case requesting a rehearing in the State court and briefs in opposition to the rehearing were filed *amici curiae* by respondents in this case. *On the 17th day of March the State court denied the petition for rehearing in the Highland Park case.* The denial of the petition for rehearing by the State court supports our contention that the petition for rehearing herein should be denied. There can be no dispute about this because this is the position of petitioners as stated in their briefs in this court as follows:

> "The Supreme Court of Michigan will, within a short time, decide a case which presents identical questions of law, *which decision will be conclusive* as to the applicable principles of law governing this case, and this Court should await such decision."
>
> * * * * *
>
> "Respondents in this case must recognize that the forthcoming opinion of the Michigan Court must either confirm what the Court of Appeals has decided, or flatly contradict it, for they have filed briefs *amici curiae* urging that the Court of Appeals' opinion ought to be followed. The granting of a rehearing can visit no harm upon respondents, for if the Michigan Court decides as they urge it to do in their briefs *amici curiae, it will end this case.*"

It now clearly appears that petitioners' attempts to convince the Michigan Supreme Court that it should repudiate the State court's holdings, upon which the United States Circuit Court of Appeals (Sixth Circuit) grounded its decision in these case, have failed. The mandamus relief sought in the Highland Park case was similar to the relief

sought in this case and the Michigan court unanimously denied the writ and grounded its decision upon the same law upon which the Circuit Court of Appeals based its decision in this case, namely:

(a) That under Michigan law the controlling legal distinction between sewers and drains is the primary purpose of the structure.

(b) That the Drain Commissioner's jurisdiction is limited to the building of a drain and where the Drain Commissioner exceeds his jurisdiction and constructs a sewer, the entire proceedings pursuant to which the bonds are issued, are void and the doctrine of estoppel by recitals does not apply.

To bring clearly before this Court the analysis of the State court's decision which the Michigan Supreme Court had before it when it denied the petition for rehearing, we quote from our brief, as *amici curiae,* in the State court:

(Excerpt from Brief of Amici Curiae in opposition to Petition for Rehearing in case of Highland Park v. Clark)

Section I of Petitioner's Brief is entitled "Significance of Term 'Storm Sewer Drain' used in the Proceedings and Bonds" and is an attempt to twist the language of the Opinion of this Court around to say what in reality the Court did not say at all.

Petitioner's attempt to upset the decision of this Court upon the basis of the allegation that this Court gave an improper emphasis to the word "storm sewer" in the course of its Opinion, appears trivial in view of a proper analysis and understanding of the bases of this Court's decision. The decision of this Court was based upon the following holdings of the Court and no

amount of argument on the part of the Petitioners can change the correctness of the holdings nor enable the bondholders, in view of these holdings, to enforce the collection of taxes to pay for bonds issued in the course of proceedings which were void for want of jurisdiction. This Court held:

> 1. "Careful consideration requires the conclusion that decision in the instant case is governed by the reasoning in *Village of Oak Park v. Van Wagoner,* 271 Mich. 450. Although five members of the court concurred specially in the opinion in that case, nevertheless the court was unanimous in holding that the Royal Oak No. 7 project was a sewer and not a drain; that the defendant drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void and subject to collateral attack. In arriving at this conclusion, the court unanimously concurred in the statement that, 'The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law.' "
>
> (a) "We held unanimously that all assessments levied against the village should be cancelled and set aside and permanently restrained the drain commissioner from collecting, or attempting to collect, the same or any portion thereof."
>
> (b) "If the levy of a tax in 1935 'would constitute the taking of property without due process of law,' the levying of a tax now would also constitute the taking of property without due process of law."
>
> (c) "Since we held in 1935 that it was illegal to levy and collect any tax assessed as

> a result of this project, under the doctrine of *stare decisis* we must hold now that it is illegal to levy and collect a tax to pay outstanding bonds issued incident to the same project."

In view of the above holdings of this Court it would be impossible for Petitioners, under any circumstances, to force the levy and collection of a tax to pay for the outstanding bonds. Certainly the relief by mandamus sought by Petitioners cannot be granted in the face of the holding and decree of this Court in the Village of Oak Park case, upheld in this case, cancelling and setting aside the assessments and permanently restraining the collection or attempt to collect taxes to pay for this project;

> 2. "Certainly the board of supervisors of Oakland County cannot be estopped by the drain commissioner of that county because he had no legal authority whatever to speak for them and the counter signature of the county clerk was merely a ministerial act."*

The effect of the above holding of the Court was to eliminate any possibility that the county or county officers could be held liable under the estoppel doctrine;

> 3. "The Drain Commissioner had no authority to build a *sewer* drain. He was wholly without jurisdiction and his void acts cannot estop the drain district, even though it can be argued that the taxpayers of the drain district have profited by his unauthorized acts."

In the above language this Court clearly states the applicable, fundamental rule of estoppel. This Court clear-

---

*This statement of the Michigan Supreme Court is in direct support of the holding of the Circuit Court of Appeals in these cases that no estoppel arising out of the acts of the drain commissioner could run against the townships, municipalities or county officers. (119 Fed. (2d) 163).

ly and concisely stated that there can be no estoppel against the Drain District because the Drain Commissioner built a sewer which he had no authority to build and because the acts of the Drain Commissioner were void for lack of jurisdiction.

Regardless of whatever interpretation Petitioners seek to give to the emphasis placed by this Court upon the word "sewer" the fact still remains that this Court based its decision upon the fact that there was no estoppel of the Drain District, because the drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void;

> 4. (From the concurring Opinion of Justice Boyles):
>
> "We repeat that the controlling legal distinction between sewers and drains is the primary purpose of the structure which determines its character regardless of what may be purely incidental purposes. The Federal courts likewise recognize the Michigan rule, here repeated, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction."

Justice Boyles flatly bases his concurring Opinion on the ground that the Village of Oak Park decision is controlling and reiterates the primary purpose rule and the "Michigan" rule of law that the doctrine of estoppel does not operate in favor of bondholders against the Drain District or a municipality whenever there is a complete lack of jurisdiction. This opinion, which was concurred in by all the other members of the Court, is complete in itself and completely refutes the arguments made by petitioners. *This court having determined the entire proceedings to be invalid for want of jurisdiction,*

further reference to storm sewer drain, is not a necessary part of the court's decision in passing upon the estoppel question. The decision of this court would have been the same and must of necessity be the same under the circumstances as if no reference were made thereto.

(End of excerpt from Respondents' Brief in opposition to Rehearing in Highland Park case.)

ANSWER TO PETITIONER'S ERRONEOUS ARGUMENTS

Now that petitioning counsel are confronted with their requested decision in the Highland Park case and with the real basis of the State court's decision, they have resorted to clearly erroneous arguments as follows:

(1) It is claimed that the State court in the Highland Park case ruled against the *res adjudicata* theory adopted by the Circuit Court of Appeals. There is no merit to this argument because the Michigan court found it unnecessary to pass upon the *res adjudicata* question, the language of the State court being:

> "We do not say that the Village of Oak Park case is *res adjudicata* of the rights of bondholders." The State court found it unnecessary to pass upon the *res adjudicata* question because it held that under the rule of *stare decisis* the Village of Oak Park case was binding and "that the drain district or municipality is not estopped

from denying the validity of the bond issue on the ground of total lack of jurisdiction."

It is apparent from an examination of the record and the opinion of the Circuit Court of Appeals in these cases that the opinion of the court would have been the same, even though the court had not held that the previous decisions of the State court, determining the proceedings to be illegal and void, were *res adjudicata* because of the independent findings in these proceedings. The Special Master, the District Judge and the Circuit Court of Appeals independently found that the entire proceedings were illegal and void under the law of the State and made this finding from independent evidence presented by the record. We repeat that these findings of the Federal Court stand by themselves irrespective of the *res adjudicata* issue and fortified by the decision of the State court that its previous decisions under similar facts and circumstances are *stare decisis*.

(2) Petitioners again state that the Circuit Court of Appeals erroneously rejected the case of *Thompson v. Mecosta*, 127 Michigan 522 and similar cases, and here again they have fallen into the fundamental error apparent throughout all their briefs, in that they have failed to distinguish cases like the Mecosta case, where there was no holding of complete lack of jurisdiction in the premises, from cases like the present drain cases, where the State court has repeatedly held as did the Circuit Court of Appeals, that the Drain Commissioner was wholly without jurisdiction in the premises.*

---

*The Drain Commissioner's jurisdiction is limited by the State Constitution, the statutes from which he derives his authority and the *stare decisis* limitations of the Michigan decisions. See Respondents' Brief in Opposition to Petition for Certiorari, page 47, and Respondents' Reply Brief, page 10.

(3) The petitioners have placed an erroneous construction upon the State court's use of the words "storm sewer" in their interpretation of the State court's opinion on the estoppel question.*

In an earlier part of this brief we have pointed out fully that the true basis of the court's decision was the lack of jurisdiction in the Drain Commissioner to do what he attempted to do and that once the State court determined the entire proceedings to be invalid for want of jurisdiction further reference to "storm sewer" drain is not a necessary part of the court's decision in passing upon the estoppel decision. The decision of the State court would have been the same and must of necessity be the same under the circumstances as if no reference were made thereto. The tax assessments in the Highland Park case were wiped out and decreed illegal and void in the Village of Oak Park case** because the entire proceedings were found to be illegal and void for want of jurisdiction *and not because of any statement contained in the bond.* Likewise the assessments in the cases before this court were wiped out and decreed illegal and void under the law of the State because the Drain Commissioner was entirely devoid of jurisdiction in the premises.

The Circuit Court of Appeals in deciding these cases quoted with approval the following language of the Michi-

---

*It is evident that the Michigan Supreme Court was not impressed with the argument of petitioners on this point because, although petitioners strenuously argued the point in their brief, a copy of which was attached to Petitioners' Reply Brief on their Petition for Rehearing in the Martin Drain case, this docket No. 289, the Michigan Supreme Court promptly denied their petition for rehearing.

**The case of *Village of Oak Park v. Van Wagoner*, 271 Mich. 450, is the case which petitioners in the Highland Park case sought to overrule.

gan Supreme Court in the said case of *Village of Oak Park v. Van Wagoner:*

> "The acts of the Drain Commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances, no estoppel would arise to bar an action to restrain the collection of the void tax."

In the City of Highland Park case the Michigan Supreme Court reaffirmed its decision in the Village of Oak Park case and quoted with approval the above language, which had been quoted by the Circuit Court of Appeals. In addition thereto, the Michigan Supreme Court in holding that the drain district or municipality is not estopped from denying the validity of a bond issue on the ground of total lack of jurisdiction *stated that the Federal Courts had likewise recognized the said rule and cited in support thereof the Circuit Court of Appeals' decision in these cases.* Petitioners, therefore, are now asking this court to grant a rehearing in this case on the ground that the Circuit Court of Appeals did not properly determine and follow Michigan law, where as a matter of fact the Circuit Court of Appeals in these cases determined what the Michigan law is, based its decision in these cases on what it had determined the Michigan law to be and then *the Michigan Supreme Court put its unanimous stamp of approval on the holding of the Circuit Court of Appeals when it cited with approval the decision of the Circuit Court of Appeals in these cases in support of its own statement that the Federal courts recognize the Michigan rule that estoppel does not apply where there is a complete lack of jurisdiction.*

CONCLUSION

We pointed out in previous briefs that no new issue or fact has been raised which would entitle petitioners to reconsideration of their petition for certiorari by this court and that it is not the purpose of a rehearing to review questions which have been previously fully presented to the court. Counsel for petitioners requested this court to await the decision of a State case commenced after the Circuit Court of Appeals' case was decided. We have pointed out that this was a futile attempt by petitioners to change the law of the State. The State case has now been decided by the State court and a rehearing denied thereon. This decision of the State court, requested by petitioners, reaffirmed the State law upon which the Circuit Court of Appeals based its decision and cited with approval the Circuit Court of Appeals' interpretation of the State law.

We, therefore, respectfully submit that this court properly denied the petition for certiorari and that the petition for rehearing should be denied.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan;

BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

EXHIBIT A

STATE OF MICHIGAN

SUPREME COURT

CITY OF HIGHLAND PARK, a municipal corporation, NATHAN SIMONS and SEYMOUR SIMONS, Testamentary Trustees of the Estate of D. W. Simons, Deceased, KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, Relators,

v.

EARL L. CLARK, Drain Commissioner of Oakland County, and BOARD OF SUPERVISORS OF OAKLAND COUNTY, Respondents.

No. 41,609.

BEFORE THE ENTIRE BENCH:

BUSHNELL, J. Relators, who claim to be bona fide holders for value of bonds issued by Royal Oak No. 7 Storm Sewer Drain District in the Township of Royal Oak, Oakland County, Michigan, seek a writ of mandamus directing and commanding respondents, the drain commissioner of Oakland county and the board of supervisors of that county, to severally and collectively perform such acts as will result in the levy, certification and spread of all unpaid portions of the installments of taxes levied for this drain, and such supplemental or

deficiency assessment as shall be sufficient to pay all outstanding bonds of the district. We issued an order to show cause and it was stipulated between the parties that the answer of the drain commissioner and the board of supervisors should stand as the return to that order.

The proceedings to establish this drainage district were instituted on June 3, 1927, under Act No. 316, Pub. Acts 1923, (1 Comp. Laws 1929, Sec. 4836 et seq. [Stat. Ann. Sec. 11.1 et seq.]) which only authorize the construction of drains. This act has been since amended (Act No. 318, Pub. Acts 1929, and others) and now includes provisions for the building of sewers and sewage facilities in connection with drains. The proceedings progressed in the usual manner and bonds in the par amount of $191,000 were issued. The entire issue was purchased by a brokerage house in the City of Detroit and payment therefor was made to the county treasurer. The bonds were resold to various investors and these relators now hold 150 bonds of the outstanding issue.

The construction was of an underground type, of vitrified, double strength sewer crock, with catch basins for surface waters and Ys for sanitary sewer connections to each residential lot, capable of caring for sanitary sewage and surface waters of the whole area of the district. The underground conduits range from 12 to 54 inches in diameter.

The bonds have been in default since May 1, 1931, due to the suspension of the levy of installments of the assessment for this project during the years 1932 to 1936, inclusive. All bonds are now past due and interest has been in default since May 1, 1940. On December 12, 1940, relators entered into written agreement with the drain commissioner, board of auditors, and treasurer of

the county, whereby 30 per cent of the accrued interest was cancelled and refunding bonds were to be issued. Relators surrendered their interest coupons, consented to an indorsement on their bonds of a receipt for all interest to May 1, 1940, and were paid 70 per cent of the accrued interest. Respondent drain commissioner then sought authority for the issuance of refunding bonds and, on February 13, 1941, the Michigan Public Debt Commission signed an order authorizing such an issue. Relators were later informed by respondents that they would neither issue such refunding bonds nor levy any further taxes for the payment of existing bonds. The answer of respondents avers in substance that the refunding agreement, having been executed without the authority or approval of the board of supervisors, is void and of no force and effect, and that, because of the holding of this court in Village of Oak Park v. Van Wagoner, 271 Mich. 450, decided May 17, 1935, the bonds held by relators are void.

In the 12 briefs that have been filed in this cause by the parties and various amici curiae, to whom leave was granted, it is conceded that decision in this case affects not only the possibility of payment of the defaulted bonds of this issue, but many millions of other outstanding drain bonds.

The issues presented may be summarized as follows:

1. Is the decision in Village of Oak Park v. Van Wagoner, 271 Mich. 450, either res adjudicata or stare decisis?

2. Are respondents estopped by the recitals in the bonds?

3. May the validity of the drainage proceedings be attacked in a collateral suit?

4. Is Royal Oak No. 7 Storm Sewer Drain a sewer or a drain?

5. Is mandamus the appropriate remedy?

Litigation regarding the validity of drainage projects has been determined by this court in various cases, among which are the following: Clinton v. Spencer, 250 Mich. 135; Warren v. Township of Engelbrecht, 251 Mich. 608; Kinner v. Spencer, 257 Mich. 142; Township of Lake v. Millar, 257 Mich. 135; Hankinson v. Deake, 265 Mich. 1; Village of Clawson v. Van Wagoner, 268 Mich. 148; Village of Oak Park v. Van Wagoner, 271 Mich. 450; Kennedy v. Dingman, 272 Mich. 24; Meyering Land Co. v. Spencer, 273 Mich. 703; Detroit Fire & Marine Ins. Co. v. Oakland County, 284 Mich. 130; Detroit Trust Co. v. Dingman, 291 Mich 170.

In none of the above cases were bondholders actual parties, although respondents argue that bondholders were represented by the drain commissioner. Holders of bonds issued on projects covered by some of the foregoing cases have litigated their claims in the Federal courts. The most recent Federal decision is Bloomfield Drain District v. Keefe, 119 Fed. (2d) 157. Other Federal cases are an unreported one before Judge Raymond in the Western District of Michigan and Royal Oak Drain District v. Keefe, 87 Fed. (2d) 786.

No useful purpose would be served in reviewing the cited cases, each of which has been re-examined as to its applicability to the issues presented. Careful consideration requires the conclusion that decision in the instant case is governed by the reasoning in Village of Oak Park v. Van Wagoner, 271 Mich. 450. Although five members of the court concurred specially in the opinion in that case, nevertheless the court was unanimous in holding

that the Royal Oak No. 7 project was a sewer and not a drain; that the defendant drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void and subject to collateral attack. In arriving at this conclusion, the court unanimously concurred in the statement that, "The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law." We held unanimously that all assessments levied against the village should be cancelled and set aside and permanently restrained the drain commissioner from collecting, or attempting to collect, the same or any portion thereof.

The project was designated "Royal Oak No. 7 Storm *Sewer* Drain," and the bonds bore the heading, "Royal Oak No. 7 Storm *Sewer* Drain District Bond." It was recited in the bonds "that all acts, conditions and things required to be done, precedent to and in the issuance of this bond in order to make it a binding obligation of the Royal Oak No. 7 Storm *Sewer* Drain District have been done * * * and for the prompt payment hereof * * * the full faith, credit and resources of said Drain District are hereby irrevocably pledged." The underground conduits are all of the same size and character as when they were laid and are serving the same purpose for which they were laid. If the levy of a tax in 1935 "would constitute the taking of property without due process of law," the levying of a tax now would also constitute the taking of property without due process of law.

We do not say that the Village of Oak Park case, supra, is res adjudicata of the rights of these relator bondholders nor do we hold that they had their day in court, through representation by the drain commissioner who

was the defendant in that action. We do say, however, that the rule of stare decisis should be applied even though equitable considerations might prompt a different result. Detroit Trust Co. v. Detroit City Service Co., 262 Mich. 14, 35. See, also People v. Droste, 160 Mich. 66, 75, and Colborne v. Detroit United Railway, 177 Mich. 139, 142. Since we held in 1935 that it was illegal to levy and collect any tax assessed as a result of this project, under the doctrine of stare decisis we must hold now that it is illegal to levy and collect a tax to pay outstanding bonds issued incident to the same project.

It is urged that respondents are estopped by the recitals in the bonds to deny their validity. Generally speaking, a municipal corporation cannot be estopped by the unauthorized and illegal acts of its officers. Certainly the board of supervisors of Oakland county cannot be estopped by the drain commissioner of that county because he had no legal authority whatever to speak for them and the counter signature of the county clerk was merely a ministerial act.

Is the drain district estopped by the recitals of the drain commissioner? Among the authorities cited in support of relators' contention, the case of Thompson v. Village of Mecosta, 127 Mich. 522, is typical. In that case the Village of Mecosta had authority to issue public improvements bonds and, so far as the bonds issued were concerned, they were perfectly good on their face. There was nothing to challenge the attention of the purchaser, such as the title of the proceedings and the heading of the bonds in the instant case. They were designated only as public improvement bonds of the Village. The bonds were, however, "delivered to the Hutchinson Manufacturing Company of Jackson, Mich., as a bonus

or aid to parties erecting a gristmill," a purpose for which the village wholly lacked authority to issue bonds, namely, a private improvement. The bonds upon their face "unquestionably carried a false pretense." This court held that—

> "a bona fide purchaser for value had a right to rely upon the statement of the board, appearing in the bond, that it was issued to borrow money under this act, for lawful purposes; i. e., public improvements." Citing authorities.

Judgment, however, for plaintiff was reversed and a new trial ordered because of the absence of proof of bona fides.

In the instant case there is no showing, and can be no showing, of false pretense. Each obligation now in question bore the title, "Royal Oak No. 7 Storm *Sewer* Drain District Bond." The drain commissioner had no authority to build a *sewer* drain. He was wholly without jurisdiction and his void acts cannot estop the drain district, even though it can be argued that the taxpayers of the drain district have profited by his unauthorized acts.

Since relators do not present a case warranting the relief asked for, we need not pass upon the propriety of mandamus as a remedy in this action.

The writ of mandamus is denied. A public question being involved, no costs will be allowed.

Signed: George E. Bushnell
Henry M. Butzel
Edward M. Sharpe
B. D. Chandler
Raymond W. Starr,
Emerson R. Boyles
Walter H. North
Howard Wiest

(Title of Court and Cause)

BEFORE THE ENTIRE BENCH:

BOYLES, J. I concur on the ground that no facts are adduced in this case outside of those before us in Village of Oak Park v. Van Wagoner, 271 Mich. 450. This record shows that every step in the proceeding resulting in the issuance of these bonds, from the original application for laying out the drainage district to issuing the bonds thereon, refers to a *Storm Sewer Drain.* At the oral argument and in numerous briefs filed by amici curiae, it is urged that the validity of at least eleven other bond issues involving several millions of dollars depends upon the decision in this case. The validity of such issues depends upon the facts and circumstances under which they were issued. See Royal Oak Drain District, Oakland County, Mich. v. Keefe (U. S. Circuit Court of Appeals [6th Circuit], January 14, 1937), 87 Fed. (2d) 786. We repeat that the controlling legal distinction between sewers and drains is the primary purpose of the structure which determines its character regardless of what may be purely incidental purposes. Kennedy v. Dingman, 272 Mich. 24. The Federal courts likewise recognize the Michigan rule, here repeated, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction. Bloomfield Village Drain District v. Keefe, and four other cases, (U. S. Circuit Court of Appeals [6th Circuit], March 14, 1941), 119 Fed. (2d) 157.

Signed: Emerson R. Boyles
Howard Wiest
Walter H. North
B. D. Chandler
Raymond W. Starr
Henry M. Butzel
Edward M. Sharpe

I agree with the amplification as stated by Mr. Justice Boyles.

Signed: George E. Bushnell

Endorsed:
Filed Feb. 11, 1942
Jay Mertz
Clerk Supreme Court

In the Supreme Court—Clerk's Office

State of Michigan—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the opinions filed February 11, 1942, in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 23rd day of March, A. D. 1942.

Jay Mertz,
Clerk.

(Seal)